Abdul Aziz bin Lela v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N-05–36 OF 2007
SURIYADI, HASAN LAH AND AHMAD MAAROP JJCA
19 JANUARY 2010

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Criminal Law — Penal Code — s 302 — Murder — Appeal, against conviction and sentence — Circumstantial evidence — Whether accused committed act that caused death of deceased — Whether accused raised any reasonable doubt that another could have committed murders — Whether break in chain of evidence — Whether evidence which could be viewed in more than one way must slant in favour of accused — Whether evidence pointed irresistibly to accused's guilt — Whether prima facie case established

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The appellant was found guilty, convicted, and sentenced to death under s 302 of the Penal Code for killing his wife ('deceased'). The deceased lived with her three children viz SP22, SP21, SP20 and the appellant. In the morning of 28 March 2003, SP21 realised that the deceased was not at home and when looking for her. SP21 found traces of blood outside the front door of the driver's side of the deceased's Proton Waja, parked at the garage. The investigating officer, SP23, found a spanner in the house which had traces of blood on it. In the afternoon of 28 March 2003, SP22 received two SMS messages from the deceased's handphone. On 29 March 2003, SP23 went to the appellant's orchard after being informed by SP22 that there were signs of a recent bonfire there. There, SP23 found two cigarette butts and a crowbar. At that bonfire, he found a badly burnt remains of a human being, a gold chain, a watch and components of a burnt out mobile phone. A forensic expert, after comparing a set of mock dentures of the deceased with that of her photograph, found them to fit her. A specimen bone taken from the burnt remains showed that they were the remains of the biological mother of SP20, SP21, and SP22. The Proton Waja of the deceased, a Mercedes Benz car, a van and a lorry were seized and investigated upon. From the van, four swabs of bloodstains and strands of hair from the bonnet were taken. From the Proton Waja four swabs of blood were lifted. The blood samples from the Proton Waja, the garage floor, the spanner and the bonnet of the van were found to be blood of the deceased. DNA profiling showed that the DNA on the two cigarette butts were that of the appellant. The prosecution's case depended entirely on circumstantial evidence. The picture painted by the prosecution was that, with the desire of wanting to remarry being the motive, the appellant must have assaulted the deceased initially when she was alighting from the Proton Waja. The prosecution then ventilated further that the van was used to transport the body to the site of the bonfire at the orchard and there burned. The prosecution also

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relied on the fact that an SMS was sent from the deceased's SIM card with the card later being found in the appellant's Mercedes Benz. The learned judge found no doubts in the prosecution's case. The appellant appealed against the conviction and sentence, inter alia, on grounds that there was a complete break in the chain of evidence and that there were discrepancies in the number of exhibits.

Held, allowing the appeal:

(1) Much of the evidence pertaining to the taking of the swabs came from SP13 and SP23 who were supposed to be hands on with the investigation. SP13 testified having taken samples of blood from different locations. SP23, on 28 March 2003, took samples of blood from a spanner found at the garage. The spanner was marked but there was no evidence who marked it and what happened to it, hence creating much doubt about that spanner. On 29 March 2003 he took three swabs from the Proton Waja and five swabs from the van. That was all that he said about them. He never clarified what happened to those eight swabs. It was not known where the eight swabs went or whether had inadvertently been mingled with the swabs of SP13. There was no evidence that the swab from the spanner collected by SP23 did not contaminate the other swabs and vice versa. The 'break in the chain of evidence' had not been bridged by the prosecution hence making the results of the analysis doubtful (see paras 13 & 15–16); *Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 302 referred.

(2) In relation to the two cigarette butts found by SP23 at the bonfire, there was no evidence as to the immediate measures or subsequent actions undertaken surrounding the butts. To make matters worse, if only two cigarette butts were recovered from the bonfire site, why did the chemist receive three? Further, the evidence showed that two more cigarette butts were recovered at the garage and the office. This brought the total to four cigarette butts recovered by the police. Why the fourth cigarette butt was not sent for DNA analysis remained unanswered. Thus, there was no certainty whether the two cigarette butts examined by the chemist, supposedly carrying the DNA of the appellant, were picked up from the vicinity of the bonfire (see para 17).

(3) There was no evidence to establish who marked or packed all the exhibits sent to the chemist and where they were kept before reaching the latter. Even the correct number of exhibits recovered were in doubt. This was certainly a confused state of affairs (see para 18).

(4) The police recovered the SIM card six days later in the appellant's Mercedes Benz, placed on top of the dashboard covered by some plastic material. The issue of the SIM card was riddled with questions such as why was the SIM card left carelessly on the dashboard, where anyone

could have found it without much effort, after coldly executing the crime followed by the meticulous retrieving of the SIM card from the mobile phone. SP9 a police officer who received the Mercedes Benz never adduced any evidence of the approximate time when he impounded the vehicle. The appellant stated that he handed the vehicle over to the police at 5.30pm about 1 hour and 22 minutes after the last SMS message was received by SP23. SP19 admitted that the Mercedes Benz was actually his, with the appellant merely permitted to use it. Hence, there was no evidence adduced to indicate only the appellant had access to the vehicle at the relevant time. Since as this piece of evidence could be viewed in more than one way, it thus must slant in favour of the appellant (see paras 19, 19(d) & 20); *Abdullah Zawawi bin Yusof v Public Prosecutor* [1993] 3 MLJ 1 and *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 referred.

(5) With the evidence of the cigarette butts being inadmissible and the issue of the SMS messages unhelpful to the prosecution, it was obvious that the latter was without any solid evidence except for innuendos and suspicion. Further, SP20 testified that the relationship between family members were good and even added that the deceased's relationship with the appellant was normal. The prosecution had thus failed to establish a prima facie case. With so many loose ends, the available evidence did not point irresistibly to the appellant's guilt (see paras 21 & 25–26).

[Bahasa Malaysia summary

Perayu didapati bersalah, disabitkan dan dihukum mati di bawah s 302 Kanun Keseksaan kerana membunuh isterinya ('si mati'). Si mati tinggal bersama tiga anaknya iaitu SP22, SP21, SP20 dan perayu. Pada pagi 28 Mac 2003, SP21 menyedari bahawa si mati tiada di rumah dan pergi mencarinya. SP21 menemui kesan darah di luar pintu hadapan bahagian pemandu kereta Proton Waja si mati yang diparkir di garaj. Pegawai penyiasat, SP23, telah menjumpai sepana dalam rumah dengan kesan darah padanya. Pada tengahari 28 Mac 2003, SP22 telah menerima dua pesanan SMS daripada telefon bimbit si mati. Pada 29 Mac 2003, SP23 telah pergi ke kebun perayu selepas diberitahu oleh SP22 terdapat tanda unggun api di situ. Di situ, SP23 menjumpai dua puntung rokok dan perunjang (*crowbar*). Di tempat unggun api itu, dia menemui mayat manusia yang terbakar teruk, rantai emas, jam tangan dan komponen telefon bimbit yang terbakar. Pakar forensik, selepas membandingkan set gigi palsu replika si mati dengan gambarnya, mendapati ia berpadanan. Tulang spesimen yang diambil daripada mayat terbakar itu menunjukkan bahawa ia adalah mayat ibu kandung SP20, SP21 dan SP22. Proton Waja si mati, sebuah kereta Mercedes Benz, sebuah van dan sebuah lori telah dirampas dan diperiksa. Dari van itu, empat swab kesan darah dan helaian rambut dari bonet diambil. Dari Proton Waja, empat swab darah diambil. Sampel-sampel darah dari Proton Waja, lantai garaj, sepana dan bonet van didapati merupakan darah si mati. Profil DNA menunjukkan bahawa

A DNA pada dua puntung rokok adalah perayu. Kes pendakwaan bergantung keseluruhannya atas keterangan mengikut keadaan. Gambaran yang diberikan oleh pendakwaan adalah bahawa, dengan keinginan untuk berkahwin lain sebagai motif, perayu mungkin telah menyerang si mati sebelum dia keluar dari Proton Waja itu. Pendakwaan kemudian membuat andaian selanjutnya B bahawa van tersebut telah digunakan untuk membawa mayat ke tempat unggun api di kebun itu dan dibakar di sana. Pendakwaan juga bergantung kepada fakta bahawa SMS telah dihantar daripada kad SIM si mati di mana kad itu kemudian telah ditemui dalam Mercedes Benz perayu. Hakim yang bijaksana mendapati tiada keraguan dalam kes pendakwaan. Perayu telah C merayu terhadap sabitan dan hukuman, antara lain, atas alasan bahawa terdapat rantaian keterangan yang langsung terputus dan bahawa terdapat percanggahan dalam bilangan ekshibit.

D **Diputuskan**, membenarkan rayuan:

(1) Kebanyakan daripada keterangan berkaitan mengambil swab datang daripada SP13 dan SP23 yang sepatutnya arif tentang siasatan. SP13 memberi keterangan mengambil sampel darah dari lokasi berbeza. SP23, pada 28 Mac 2003, telah mengambil sampel darah daripada sepana yang E ditemui dalam garaj. Sepana itu ditandakan tetapi tiada keterangan siapa yang menandakannya dan apa yang berlaku kepadanya, sehingga menimbulkan keraguan tentang sepana tersebut. Pada 29 Mac 2003 dia telah mengambil tiga swab dari Proton Saga dan lima swab dari van. Itu sahaja yang disebutkan berkenaannya. Dia tidak menjelaskan apa yang F berlaku kepada lapan swab tersebut. Tidak diketahui di mana lapan swab itu atau sama ada secara tidak sengaja telah bercampur dengan swab SP13. Tiada keterangan bahawa swab daripada sepana yang diambil oleh SP23 tidak mencemarkan swab lain dan sebaliknya. 'Break in the chain of evidence' tidak dikurangkan oleh pendakwaan sehingga menyebabkan G hasil analisis diragui (lihat perenggan 13 & 15–16); *Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 302 dirujuk.

(2) Berkaitan dua puntung rokok yang ditemui oleh SP23 di tempat unggun api, tiada keterangan mengenai langkah segera atau tindakan susulan H yang dilakukan berkaitan puntung-puntung tersebut. Untuk menjadikan keadaan lebih buruk, jika hanya dua puntung rokok ditemui di tempat unggun api itu, bagaimana ahli kimia menerima tiga? Selanjutnya, keterangan menunjukkan bahawa dua lagi puntung rokok ditemui di garaj dan pejabat. Ini membawa kepada jumlah empat I puntung rokok yang telah ditemui oleh polis. Kenapa puntung rokok keempat tidak dihantar untuk DNA analisis masih tidak dijawab. Oleh itu, tiada kepastian sama ada dua punting rokok diperiksa oleh ahli kimia, yang sepatutnya membawa DNA perayu, diambil dari tempat unggun api itu (lihat perenggan 17).

(3) Tiada keterangan untuk membuktikan siapa yang menandakan atau membungkus semua ekshibit yang dihantar ke ahli kimia dan di mana ia disimpan sebelum mendapatnya. Bahkan jumlah sebenar ekshibit yang ditemui diragui. Oleh itu ia memang keadaan yang mengelirukan (lihat perenggan 18).

(4) Polis menemui kad SIM enam hari kemudian dalam Mercedes Benz perayu, diletakkan atas papan pemuka yang ditutup oleh bahan plastik. Isu kad SIM diselubungi dengan persoalan seperti kenapa kad SIM dibiarkan begitu sahaja di atas papan pemuka, di mana sesiapa boleh menjumpainya dengan senang, selepas dengan kejam melakukan jenayah diikuti dengan teliti mendapatkan kad SIM daripada telefon bimbit. SP9 pegawai polis yang menerima Mercedes Benz itu tidak mengemukakan apa-apa keterangan berhubung masa yang tepat bila dia merampas kenderaan itu. Perayu menyatakan bahawa dia telah menyerahkan kenderaan itu kepada pihak polis pada pukul 5.30 petang lebih kurang 1 jam 22 minit selepas pesanan SMS terakhir diterima oleh SP23. SP19 mengaku bahawa Mercedes Benz itu sebenar milkinya, yang mana perayu hanya dibenarkan menggunakannya. Justeru itu, tiada keterangan dikemukakan untuk menunjukkan hanya perayu mempunyai akses kepada kenderaan itu pada masa berkaitan. Oleh kerana keterangan ini boleh dilihat dari sudut lain, maka ia patut menyebelahi perayu (lihat perenggan 19, 19(d) & 20); *Abdullah Zawawi bin Yusof v Public Prosecutor* [1993] 3 MLJ 1 dan *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137 dirujuk.

(5) Dengan keterangan puntung rokok tersebut tidak diterima dan isu pesanan SMS tidak membantu pendakwaan, adalah jelas bahawa pendakwaan tiada keterangan kukuh kecuali innuendo dan syak wasangka. Selanjutnya, SP20 memberi keterangan bahawa hubungan antara ahli keluarga adalah baik dan juga mengatakan bahawa hubungan si mati dengan perayu adalah normal. Pendakwaan dengan itu telah gagal membuktikan kes prima facie. Dengan lompang yang banyak, keterangan sedia ada tidak dapat membuktikan kebersalahan perayu (lihat perenggan 21 & 25–26).]

Notes

For cases on s 302 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1698–1776.

Cases referred to

Abdullah Zawawi bin Yusof v PP [1993] 3 MLJ 1; [1993] 2 AMR 2121, SC (refd)

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209, FC (refd)

Chang Kim Siong v PP [1968] 1 MLJ 36, FC (refd)

Gooi Loo Seng v PP [1993] 2 MLJ 137, SC (refd)

A *Hussin bin Sillit v PP* [1988] 2 MLJ 232; [1988] 1 CLJ (Rep) 128, SC (refd)
McGreevy v Director of PP [1973] 1 WLR 276 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
PP v Richard Chia Kok Hiong [2007] 3 MLJ 129, HC (refd)
PP v Syed Muhamad Faysal bin Syed Ibrahim [2004] 6 MLJ 302; [2004] 4 AMR
B 287, HC (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116, FC (refd)
Transport Ministry v Garry [1973] 1 NZLR 120, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

C **Legislation referred to**

Penal Code ss 300, 300(a), 300(c), 302

Appeal from: Criminal Trial No 45–11 of 2003 (High Court, Shah Alam)

Hisyam Teh Poh Teik (Hanif Hassan with him) (Hanif Hassan & Co) for the
D *appellant.*
Awg Armadajaya bin Awg Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi JCA (delivering judgment of the court):

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[1] The appellant was found guilty, convicted, and sentenced to death under s 302 of the Penal Code for killing his wife, one Zarina bt Mohd Akhir. The charge reads as follows:

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> Bahawa kamu antara jam 12.00 tengah malam 27/3/2003 hingga jam 6.20 petang 28/3/2003, di hadapan rumah nombor 10-C, Kampung Tanjung Jati, Kuala Pilah, di dalam Daerah Kuala Pilah di dalam negeri, Negeri Sembilan, telah membunuh dengan menyebabkan kematian terhadap Zarina Binti Mohd Akhir, KPT: 650610–05–5450. Oleh itu kamu telah melakukan satu kesalahan yang boleh
G dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] The brief facts of the case are as follows.

H **[3]** Zarina bt Mohd Akhir, the deceased, was married to the appellant. She stayed at Kampong Kayu Jati, Kuala Pilah together with her three children viz Eddie Azrul Hafiza ('SP22'), Eddie Nurul Azwan ('SP21'), Eddie Nazrul Hizam ('SP20') and the appellant. On 27 March 2003 at about 8pm the deceased with SP18, her friend, left the house with her Proton Waja. At about
I midnight after sending SP18 home the deceased left for her house. The next day ie 28 March 2003 SP21 at about 9am realised that the deceased was not at home. When looking for her, SP21 found traces of blood outside the front door of the driver's side of the Proton Waja, parked at the garage. He noticed blood on the surrounding cement floor and on the grass in front of the garage.

He informed SP22 of their mother being missing, and the latter subsequently filed a missing person report with the police. The investigating officer, SP23, proceeded to the house and there found a spanner which had traces of blood on it. At the police station in the afternoon, SP22 said he just received two SMS messages, which came from the deceased's handphone. The message showed time of receipt to be 3.25pm and 4.08pm on that date ie 28 March 2003.

[4] At 9pm also on 28 March 2003, SP23 went to the appellant's orchard at Kg Dioh after being informed by SP22 that there were signs of a recent bonfire there ('bonfire'). No investigation was carried out that night as it was dark and was raining heavily. The next day on 29 March 2003, the investigating officer went again to the orchard and carried out certain investigations and observations. He found a chicken coop that had some of the dislodged planks near that bonfire. Nearby he found two cigarette butts (P28A and P29A) and a crowbar. At that bonfire, he found a badly burnt remains of a human being, a gold chain (P6), a watch (P82) and components of a burnt out mobile phone (P78). SP1, a pathologist, testified that the human remains were that of a woman aged about 40 years but was unable to confirm the cause of death. A forensic expert, after comparing a set of mock dentures of the deceased with that of her photograph (P20), found them to fit her. SP10, a chemist, testified that a specimen bone taken from the burnt remains (P65A) showed that they were the remains of the biological mother of SP20, SP21, and SP22.

[5] The Proton Waja of the deceased, a Mercedes Benz carrying registration No NAP 8000 (P87), a van registered as NAF 298 (P89), and another lorry carrying registration No NAJ 8555 (P88) were seized and investigated upon. From the van (P89), four swabs of bloodstains marked as D, D1, D2 and D3 (P45A, P46A, P47A and P48A respectively), strands of hair from the bonnet, marked as D4 and D5 (P49A and P50A) were taken. From the Proton Waja four swabs of blood marked B, B1 and B2 (respectively P32A, P33A and P34A) were lifted. SP10 testified that blood samples from the Proton Waja, the garage floor and the spanner, and from the bonnet of the van were blood of the deceased. This witness too testified that through DNA profiling the DNA on the two cigarette butts (P28A and P29A) were that of the appellant.

[6] Since the prosecution did not have any witness who witnessed the act of the killing, or the person who committed it, the prosecution's case depended on circumstantial evidence. In brief, the prosecution attempted to establish that the charred remains found near the chicken coop were that of the deceased by DNA profiling. SP20, SP21, and SP22 confirmed that the gold bracelet, watch, and remains of the hand phone found at the bonfire were that of the deceased's. Further, the traces of blood found near the Proton Waja, the garage and the spanner, and hair samples from the van, through the testimony of the expert were established as that of the deceased. As the two cigarette butts found

at the bonfire contained the DNA of the appellant, the prosecution's stance was that he must have been at that bonfire at the relevant time when the deceased was burnt. The picture painted by the prosecution was that, with the desire of wanting to remarry being the motive, the appellant must have assaulted the deceased initially when she was alighting from the Proton Waja. There was no evidence adduced by the prosecution whether she died in the course of that assault. Section 302 of the Penal Code reads that whoever commits murder shall be punished with death. Under s 300 culpable homicide is murder:

(a) if the act by which the death is caused is done with the intention of causing death;

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[7] The burning of the deceased, whether already dead at the material time after intentionally assaulting her to death, or still alive but unconscious when burned, the eventual result was still death; the killer would fall squarely under any of the above subparagraphs. We see no necessity in discussing the issue further due to its clarity.

[8] The prosecution then ventilated further that the van (NAF 298) was used to transport the body to the site of the bonfire at the orchard and there burned. As said above the DNA in the cigarette butts picked up from the site established his presence at the time when the bonfire was lit. The fact that an SMS was sent from the deceased's SIM card carrying No 019–2550354, with the card later found in the appellant's Mercedes Benz merely confirmed his complicity.

[9] The learned judge, as clarified in his grounds of judgment, stated that he found no doubts in the prosecution's case that death was caused by the appellant, with subparas (a) and (c) of s 300 of the Penal Code having been complied with. From the totality of the evidence, the appellant had failed to create any reasonable doubt on the prosecution's case. That being so the prosecution had successfully established at the end of the defence case a case beyond reasonable doubt, whereupon he was found guilty, convicted, and sentenced to death.

[10] With such supposed ironclad evidence, why then did this panel set the appellant free? To appreciate this outcome it is necessary to understand the submission of the appellant, inter alia:

(a) there was a complete break in the chain of evidence;

(b) there were discrepancies in the number of exhibits;

(c) no reason to kill the deceased even though he wanted to remarry;

(d) his alibi;

(e) want of challenge by the prosecution of the appellant's case even though it depended on circumstantial evidence eg putting to him that he killed her, transporting the body to the bonfire, that the cigarette butts were his etc; and

(f) the conviction was unsafe.

[11] Let us peruse first the evidence at the stage of the prosecution in particular whether based on the adduced evidence a prima facie case was indeed established. We begin by discussing the issue of the complete break in the chain of evidence and that there were discrepancies in the number of exhibits. The strength of the prosecution's case here principally lies on the DNA evidence, the very tool to establish effectively its case. It is all well and good to successfully procure the samples and pieces of evidence on the scene, but they could also be the cause of the appellant's acquittal if the investigating officers handling the exhibits were to do a shoddy job when packing, marking, identifying or ensuring their integrity. Dr Kasinathan Nadesan in *Forensic Medicine and Science* at p 261 authored:

> As a general guideline, items such as clothing bearing bloodstains or other biological evidence are packaged in paper. Placement in plastic bags would result in bacterial growth and growth of mould and therefore should be avoided. All items, if damp, or wet, should be air-dried (not under the sun) prior to packaging.
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> Small items should be submitted in its entirety. Each item should be separately packed, properly sealed, avoiding contamination due to potential breakage …

[12] For that matter, poor handling of the exhibits by the learned peputy public Prosecutor when tendering the exhibits in the course of the hearing, could undo any good investigation. The main thrust of the defence here is just that and I now proceed to discuss those errors.

[13] Much of the evidence pertaining to the taking of the swabs came from SP13 and SP23 who were supposed to be hands on with the investigation. SP13 testified that having inspected the van and the surrounding areas he noticed spots of blood at several places and strands of hairs in the van. He then

took samples of the blood from different locations. SP23, on 28 March 2003, took samples of blood from a spanner found at the garage (*rekod rayuan* 160). At pp 97 and 399 of the *rekod rayuan* C1 was marked as the spanner, but regretfully, there is no evidence who marked it and what happened to it, hence creating much doubt about that spanner. On 29 March 2003 at about 2.30pm he took three swabs from the Proton Waja and five swabs from the van. Unfortunately, that was all that he said about them. He repeated the above mistakes of SP13 and never clarified what happened to those eight swabs. Dr Kasinathan Nadesan also had occasion to state 'when evidence is recovered, there is a requirement that the evidence or its proximal container be labeled with the name or initials of the recovering officer, date and time of collection, identity, marking etc'. We therefore do not know where the eight swabs went or whether had inadvertently been mingled with the swabs of SP13. Jyotirmoy Adhikary in *DNA Technology in Administration of Justice* at p 39 had occasion also to author:

> The ability to perform successful DNA analysis on biological evidence recovered from a crime scene depends very much on what kinds of specimens were collected and how were they preserved... If it is not properly collected, its biological activity may be lost. If it is improperly packaged, cross contamination might occur. And if the DNA evidence is not properly preserved, decomposition and deterioration may well occur. Any of these effects seriously affect the outcome on DNA typing.

[14] In *Public Prosecutor v Richard Chia Kok Hiong* [2007] 3 MLJ 129 under held (1) the court said:

> ... Equally important, was the need for stringent measures to be adopted to safeguard the integrity of exhibits when they were collected, handled and stored prior to the items reaching the laboratory.

[15] There was no evidence that the swab from the spanner collected by the investigating officer ('SP23') did not contaminate the other swabs and vice versa. Having considered the totality of the evidence and guided by the above references, this panel discovered that he had seriously erred when he said nothing about:

(a) how they were taken;

(b) the stringent measures taken while lifting the traces of blood in order to ensure their purity;

(c) whether they were preserved after the collection to prevent contamination in order to ensure their integrity remained uncompromised;

(d) whether they were individually packed so that the swabs were not mixed about, which could contaminate other swabs;

(e) distinctly identifying the preserved swabs;

(f) stating who packed the exhibits before being sent to the chemist; and

(g) clarifying the chain of possession.

[16] We thus held the view that the 'break in the chain of evidence' had not been bridged by the prosecution hence making the results of the above analysis doubtful (*Public Prosecutor v Syed Muhamad Faysal bin Syed Ibrahim* [2004] 6 MLJ 302; [2004] 4 AMR 287).

[17] The above sad state of affairs did not end with the blood swabs. At p 165 of the *rekod rayuan*, SP23 said he found two cigarette butts at the bonfire, the very pieces of evidence supposed to pin the appellant down to that place. Like the errors committed earlier, whether by him or SP13, the immediate measures or subsequent actions undertaken surrounding the butts also stopped there. The learned deputy public prosecutor also failed to pursue the matter regarding them. The best he did was to elicit a vague answer from SP23 when he said 'barang barang kes di hantar ke Jabatan Kimia pada 3 April 2003 and 7 April 2003'. To make matters worse, if only two cigarette butts were recovered from the bonfire site, why did the chemist receive three (at pp 396 and 397 where A5, A7, and C13 contained them)? To compound it, at p 348 of the *rekod rayuan* exhs P11E and P11F established that two more cigarette butts were recovered at the garage and the office. This brings the total to four cigarette butts recovered by the police. Why the fourth cigarette butt was not sent to the chemist department for DNA analysis also remained unanswered. With the author of the markings on A5, A7 and C13 a mystery, let alone there is no certainty whether the two cigarette butts examined by the chemist, supposedly carrying the DNA of the appellant, were picked up from the vicinity of the bonfire the prosecution thus failed to establish his presence there beyond reasonable doubt. In a nutshell with a scenario of uncertainty prevailing, the two impugned cigarette butts could have been the two picked up at the garage and the office.

[18] The break in the chain of evidence, and the exhibits also compromised, conceded many a time by the learned deputy public prosecutor, could be summarised in the following manner: there was no evidence to establish who marked or packed *all* the exhibits sent to the chemist and where they were kept before reaching the latter. Even the correct number of exhibits recovered were in doubt. SP10, the chemist, in the course of his oral evidence and report showed that he received 40 items (see RR 396) whilst SP11 who took the exhibits on 30 August 2003 from the chemist department received 42 'sampul berseal' (at p 116). Yet at p 173 of the *rekod rayuan* the investigating officer said he received 53 items from the chemist department. This is certainly a confused state of affairs.

[19] The last piece of evidence relied upon by the prosecution were the two short messages (SMS) that emanated from the deceased's mobile phone. SP23 said he received two SMS messages from the deceased's mobile phone at 3.25pm and 4.08pm on that date ie 28 March 2003. The prosecution's stance was that the appellant wanted to create the impression that the deceased was still alive at those hours. By some good fortune, the police recovered the SIM card six days later in the appellant's Mercedes Benz, placed on top of the dashboard covered by some plastic material. The panel found the issue of the SIM card riddled with many questions, inter alia:

(a) why the necessity for the murderer to meticulously retrieve the SIM card but leaving behind the mobile phone;

(b) prior to the taking of the Mercedes Benz by the appellant from Md Zulkifli (his driver) could anyone else have driven it away. The non-calling of Md Zulkifli did no favours to this unanswered question;

(c) could that someone or even Md Zulkifli have left the SIM card on the vehicle without the appellant's knowledge;

(d) why was the SIM card left carelessly on the dashboard, where anyone could have found it without much effort, after coldly executing the crime followed by the meticulous retrieving of the SIM card from the mobile phone;

(e) why did it take the police six days to find the SIM when it was quite easy to find; and

(f) as the card was found six days after the vehicle was impounded, could someone else other than the appellant have placed it on that dash board during that length of time?

[20] SP9 a police officer who received the Mercedes Benz never adduced any evidence of the approximate time when he impounded the vehicle. The appellant stated that he handed the vehicle over to the police at 5.30pm about 1 hour and 22 minutes after the last SMS message was received by SP23. We thus have no idea when the appellant actually took over the vehicle (and admitted by the learned deputy public prosecutor), one of the pieces in the jigsaw puzzle, that could have been answered promptly if Md Zulkifli had been called as a witness by the prosecution. This unfortunately did not take place as he was offered to the appellant hence the gap in the prosecution's evidence. To exacerbate matters for the prosecution, SP19 admitted that the Mercedes Benz was actually his, with the appellant merely permitted to use it. In a gist between 3.25pm and 4.08pm on 28 March 2003, without any evidence adduced to indicate only the appellant had access to the vehicle, the following people could have access to it, viz Md Zulkifli, SP19 and even the children of the appellant (SP22 and SP23). In brief, as this piece of evidence could be viewed in more than one way, it thus must slant in favour of the appellant (*Abdullah Zawawi*

bin Yusof v Public Prosecutor [1993] 3 MLJ 1; [1993] 2 AMR 2121; *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137). Such an uncertainty brings to mind the remarks of the Court of Appeal of Northern Ireland in *McGreevy v Director of Public Prosecutor* [1973] 1 WLR 276 when it said:

> Whether at a criminal trial with a jury, in which the case against the accused depends wholly or substantially on circumstantial evidence, it is the duty of the trial judge not only to tell the jury generally that they must be satisfied of the guilt of the accused beyond reasonable doubt, but also to give them a special direction by telling them in express terms that before they can find the accused guilty they must be satisfied not only that the circumstances are consistent with his having committed the crime but also that the facts proved are such as to be inconsistent with any other reasonable conclusion.

[21] With the evidence of the cigarette butts being inadmissible and the issue of the SMS messages unhelpful to the prosecution, it was obvious that the latter was without any solid evidence except for innuendos and suspicion. Abdul Hamid Omar LP in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 at p 141 clearly stated that suspicion is not evidence however grave it may be. It was undeniable that the appellant was not sharing the same bedroom with his wife. On the other hand, that relationship was not of a violent or extreme nature that must culminate in the taking of a life. There was no police report filed by the deceased person to indicate the appellant's propensity toward violent acts. SP20 testified that the relationship between family members were good and even added that the deceased's relationship with the appellant was normal (*rekod rayuan* at pp 141 and 145). On that premise, unless there was cogent and admissible evidence adduced by the prosecution, this panel was not prepared to accept that merely on the existence of a marriage turned sour, or of wanting to marry again or had indeed behaved rather callously towards the disappearance of the deceased, a prima facie case had been established by the prosecution. HT Ong CJ in *Sia Soon Suan v Public Prosecutor* [1966] 1 MLJ 116 succinctly said, 'Irrespective of whether the court is otherwise convinced in its mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else …'. At this stage, the learned judge should have acquitted and discharged the appellant.

[22] Being oblivious of this panel's eventual stance, and to be on the safe side, learned counsel for the appellant had also beefed up the defence on additional grounds viz his alibi and the want of challenge by the prosecution of the appellant's case. Despite the sufficiency of reasons for allowing the appeal, for completeness, we will discuss the canvassed defences. The learned judge at p 266 of the *rekod rayuan* made certain findings regarding the issue of alibi, in that he disbelieved that the appellant had gone out to purchase sand when his driver could have performed that job. Certainly to purchase merely a lorry load of sand was insufficient for his construction business. He likewise disbelieved

A that he went out looking for the deceased at Kg Talang and Serting. Amongst his reasons was that he could have garnered the assistance of others to look for her instead of doing all that he did. The main objection of the appellant over this finding of facts in relation to the alibi was that, the learned judge misdirected himself by concluding that the appellant had lied. It was the
B appellant's position that the learned judge should have accepted his evidence, as the assertions were not sufficiently challenged (*Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). We see no error in this statement, as the learned judge should have acquiesced to his evidence, unless they were so incredible or
C of a romancing character (*Transport Ministry v Garry* [1973] 1 NZLR 120). If the appellant was complicit as alleged by the prosecution, and the preparations undertaken were coldly and meticulously executed it would equally have been foreseeable and reasonable for him to make a pretense of looking out for his wife. The position eventually to be held by the learned judge, which was a
D misdirection had militated against the interest of the appellant (*Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209).

[23] Regardless of the possible error committed by the learned judge, as his
E view uttered was in relation to the defence of alibi and it being uttered only pertained to what happened on 28 March 2003 the appellant was still not out of the woods. The ingredients of the charge read that the murder took place beginning from midnight 27 March 2003 until 6.20pm 28 March 2003. He testified that he left the house at 7.30am on 28 March 2003. In a nutshell, and
F by admission, he was in the house from 11.30pm on 27 March 2003 until 7.30pm of 28 March 2003. The Proton Waja from which the deceased alighted and was assaulted, was parked right in front of the appellant's house, in which he slept the night before. Therefore, the defence of alibi for the appellant could not save him from 11.30pm of 27 March 2003 until 7.30am the next day ie if
G the murder took place nearby and between that span of time. The length of time was eight hours and essentially, he was near the alleged place of the murder at that time. The defence of alibi requires him to be anywhere except the place of the crime and at the time of its commission (*Hussin bin Sillit v Public Prosecutor* [1988] 2 MLJ 232; [1988] 1 CLJ (Rep) 128).
H

[24] Even though the prosecution failed to prove positively that the murder did not take place from 7.30am until 6.20pm on 28 March 2003, and he was not bereft of explanation for that period, with him being nearby the scene for
I eight hours earlier, this panel believed that his alibi could not stand. To capitalise and succeed on this defence it was incumbent upon him to satisfy all the requirements, in that from 11.30pm 27 March 2003 until 6.20pm 28 March 2003, he was somewhere else. Whether he merely did the most natural thing, ie as it was night he merely slept in his own bed was of no help to him.

[25] We now return to the stage when we earlier concluded that the prosecution in the circumstances of the case had failed to establish a prima facie case.

[26] With so many loose ends before us, and unconvinced that the available evidence had pointed irresistibly to the appellant's guilt, we did not hesitate to allow the appeal. We set aside the finding of guilt, conviction, and sentence imposed on the appellant by the learned judge (*Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36).

Appeal allowed.

Reported by Kanesh Sundrum